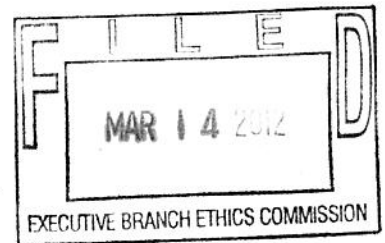


**COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
AGENCY NO. 08-023
ADMINISTRATIVE ACTION NO. 08-EBEC-0344**



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
RECOMMENDED ORDER AND NOTICE OF APPEAL RIGHTS**

JULIE R. SHIELDS

RESPONDENT

* * * * *

An Administrative Hearing was held in this matter on December 9, 2011. The Complainant, Kentucky Executive Branch Ethics Commission, was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Julie R. Shields, was represented by Luke Morgan, McBrayer McGinnis Leslie & Kirkland, and Bobby H. Richardson, Richardson Gardner Barrickman & Alexander. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. The following witnesses testified: JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue; Julie Shields, Property Valuation Administrator of Taylor County, Jill LeMaster, currently an employee of the Kentucky Auditor of Public Accounts, formerly the Executive Director of the Kentucky Executive Branch Ethics Commission; and Bill Alward, Muhlenberg Property Valuation Administrator, and formerly President of the PVA Association. The testimony of LeMaster and Alward was stipulated into the record as if they testified in person at the hearing. They both testified telephonically by agreement in a similar case that was heard earlier.

The issue in this matter is whether Julie Shields as PVA of Taylor County violated KRS 11A.020(1)(c) by using her official position or office to obtain financial gain for her husband,

Martin I. Shields, when she promoted him to Chief Deputy in May, 2007, in the Taylor County PVA Office. It is concluded that Julie Shields did violate the cited statute.

BRIEF PROCEDURAL BACKGROUND

1. The procedural background for Administrative Actions 08-EBEC-0334 through 08-EBEC-0344 are all the same. The Findings of Fact, Conclusions of Law, and Recommended Order vary according to the evidence presented at the Hearing in each case and the legal arguments made in each case. Three of the initial cases eventually settled.

2. On October 7, 2008, an Initiating Order was filed in this matter by the Executive Branch Ethics Commission. The Initiating Order in regard to Shields was one of eleven initiating orders charging various Property Valuation Administrators (PVAs) throughout the Commonwealth with violating KRS 11A.020(1)(c). The charged statute states:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

All of the PVAs were charged with violating the Executive Branch Code of Ethics because they employed and/or promoted members of their families.

3. On October 30, 2008, Shields, along with the other PVAs, filed an Answer to the Initiating Order. On December 2, 2008, the PVAs, who were all represented by the same two attorneys, filed an Agreed Order Holding Administrative Actions in Abeyance.

4. The administrative actions were stayed while the PVAs prosecuted a declaratory judgment action in Franklin Circuit Court. In that action the PVAs asserted that they were not "public servants" or "officers" as defined in KRS 11A and thus were not subject to the jurisdiction of the Executive Branch Ethics Commission. The Franklin Circuit Court judge

agreed that the Executive Branch Code of Ethics did not apply to PVAs. The Executive Branch Ethics Commission appealed the Franklin Circuit Court judgment to the Kentucky Court of Appeals. On June 18, 2010, the Court of Appeals in an unanimous decision reversed the Franklin Circuit Court judgment. *See, Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2011). On June 9, 2011, the Kentucky Supreme Court denied discretionary review.

5. On June 13, 2011, Franklin Circuit Court issued an Order of Dismissal that lifted the abeyance of this administrative action. In a July 26, 2011, prehearing conference, the parties began moving these actions forward.

FINDINGS OF FACT

6. Julie Rice Shields began working in the PVA Office as a deputy in 1985. Exhibit 4 to the Hearing. (Hereinafter cited as Ex. ____.) In 1989 she was elected Taylor County PVA. Transcript of the Hearing at 93. (Hereinafter cited as Tr. at ____.) She assumed office on December 21, 1989.

7. Shortly after she took office, Shields appointed her husband, Martin I. Shields, and her sister, Lora Bailey, as deputies in the Taylor County PVA Office. They both became PVA employees on January 2, 1990. On February 3, 2003, Shields appointed Robert C. Shively, who became her son-in law, as a deputy. Ex. 4. Shively was initially paid through OX funds, Ex. 6, 7, but by June 1, 2011, he was one of four calculated/budgeted deputies. Thus, eventually three out of the four employees of the Taylor County PVA Office were Shields' family members. The Initiating Order and the Hearing in this matter are concerned only with the promotion of Martin Shields in 2007.

8. Shields testified that in late 2006 she learned that the Executive Branch Ethics

Commission considered it unethical for PVAs to hire family members.

9. The seminal event that informed PVA Administrative Support in the Department of Revenue, Finance and Administration Cabinet, concerning the Executive Branch Code of Ethics' impact on PVAs was a training session for new PVAs in November, 2006. The session was presented by Jill LeMaster, who was the Executive Director of the Kentucky Executive Branch Ethics Commission. At the session LeMaster stressed Ethics Advisory Opinion 04-34 which states:

A family member of a public servant is not prohibited by the Executive Branch Code of Ethics from employment in the same state agency as the public servant.

However, the Commission believes that KRS 11A.020(1)(a), (c), and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, or advancement of a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages.

10. LeMaster's training session resulted in the Finance Cabinet's drafting a New Hire Form. Admitted into evidence at the Hearing was correspondence between Bill Alward, PVA Muhlenberg County, who was President of the Kentucky PVA Association, and Wesley Salyer, Executive Director of the Division of Local Government Services in the Finance and Administration Cabinet concerning the New Hire Form. Ex. 10, 11. The exchange of letters was copied to all PVAs, which would have included Shields. The form was essentially an attempt to have PVAs come into compliance with Executive Branch Ethics Advisory Opinion 04-34 by certifying that a job applicant was not a member of the PVA's family.

11. On March 29, 2007, Alward wrote,

The PVA's are put in a very unique position of being locally elected, but having to take some level of guidance from staff in Frankfort. This uniqueness, however, does not mean the PVA's may be treated differently than other agencies associated with state government. And at the end of the day, that is all we are

asking for – to be treated the same as everyone else.

Alward advised all PVAs not to use the new form. Ex. 10.

12. On April 5, 2007, Salyer responded:

No matter how unique the PVA office may be, under Kentucky law the PVA being part of the Executive Branch of state government is subject to oversight by the Ethics Commission and their opinions as well as by the Commissioner of Revenue.

Salyer also suggested that if the PVAs thought they were being wronged, he would “**strongly** suggest that you take this up with the Ethics Commission.” Ex. 11. [Emphasis in original.]

13. On May 15, 2007, Julie Shields signed a Request for Personnel Action (RPA) recommending that Martin I. Shields be promoted from Field Staff Supervisor with a pay grade of 11/4 to Chief Deputy with a pay grade of 13/4. As a result of the promotion, Martin’s monthly pay increased from \$2,507.62/month to \$2,933.00/month. Ex. 2. The Taylor County PVA Office had not had a Chief Deputy since 1994. Tr. at 99. Julie Shields did not interview anyone else for the position. Previously, the PVA oversaw all of the employees in the office. After the promotion, Martin oversaw the Office with her assistance. Tr. at 100.

14. Subsequently on July 5, 2007, the Executive Branch Ethics Commission sent Shields a letter saying that she was being investigated. Tr. at 107. After receiving the letter, Shields did not initially consult the Finance Cabinet or an attorney or the Executive Branch Ethics Commission, Tr. at 109, 135; she consulted the Executive Director of the PVA Association.

15. On the heels of the investigation letter, Shields received a copy of Executive Branch Ethics Advisory Opinion 07-19. Opinion 07-19 essentially stated that discretionary prosecutorial leniency would be exercised in regard to public servants who had not violated KRS

11A.020 after September 30, 2004, when Opinion 04-34 was issued. Family members who had been appointed previous to that date were not to be promoted or shown any preference, but they could retain their positions. As far as Shields was concerned, it meant that the PVA would not be prosecuted for violating the Executive Branch Code of Ethics in regard to her sister and son-in-law because they had been hired before 2004 and had not received discretionary promotions since 2004.

CONCLUSIONS OF LAW

16. KRS 11A.020 provides:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

The provision, as part of the Executive Branch Code of Ethics, became effective on July 14, 1992, and has not been amended subsequently.

17. In her closing argument, Shields argued initially that she did not violate the statute because she did not "use her official position or office" for the benefit of Martin Shields. Shields placed the blame for Martin's appointment squarely on the Department of Revenue referring to "Revenue's obligation to be the gate-keeper of PVAs personnel decisions," "the Respondent did not promote Martin, Revenue did," and "Revenue is the sole arbiter of this hiring decision." Respondent's Proposed Recommendations of Law at 3-4. (Hereinafter cited as Resp. at __.)

18. KRS 132.590(8), which is cited by the Respondent, indicates that the PVA "appoints" employees, who "may be removed at the pleasure of the property valuation administrator." *See also* Ex. 5 p.10. The Fiscal and Personnel Administration Office of Property Valuation Administrator handbook which originated through a conference of PVAs, states: "All

employees serve at the pleasure of their respective PVA, and are at will, unclassified, non-merit, non-P1 state employees.” Ex. 5 p.6 [Emphasis in original.]

19. As JoJuana Leavell-Greene, Human Resources Branch Manager for PVA Administrative Support, explained, Revenue’s role in regard to PVA employees is limited to “payroll, personnel, budget, training.” Tr. at 25. Her Branch ensures that the applicant has the qualifications for the job and that the office structure supports the grade requested by the PVA. Tr. at 25. Leavell-Greene pointed out that there are no qualifications for Chief Deputy. Tr. at 33. She does not review family relationships in regard to Requests for Personnel Action. Tr. at 47. Revenue is not the enforcer of the Executive Branch Code of Ethics. It is the Executive Branch Ethics Commission who enforces the Code. KRS 11A.080; KRS 11A.100. *See also* Ex. 11.

20. The second flaw in the statutory charge according to Shields is that “financial gain” must be “unwarranted or in conflict with the interests of the public at large.” Resp. at 6. Initially, it must be observed that the policy behind the Code of Ethics begins:

It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

....

(c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

KRS 11A.005(1). Justice Stephens’ concurrence in *Caudill v. Judicial Ethics Committee*, 986 S.W. 2d 435 (Ky. 1999), which is favorably referenced by Shields, appears to be especially useful in the context of this matter. The problem with financial gain connected with nepotism, which is a particular form of favoritism, is that as the Justice Stephens concluded:

The evil that I believe anti-nepotism provisions are designed to combat is the appearance of impropriety which has the inevitable effect of undermining the public's trust in a given institution.

Id., at 439. As the Complainant Commission has emphasized, what is at issue is not Martin Shield's qualifications or his compensation, it is the favoritism with which an employee was hired because of a family relationship. As Shields' testimony indicated, PVA offices can become family fiefdoms. For over two decades three members of the same family have dominated the Taylor PVA Office and then a member of a younger generation joined them in 2003. Now there is only one employee who is not a family member.

21. Shields also raises as an affirmative defense "Violation of the doctrine of *stare decisis*." According to *Black's Law Dictionary*, Seventh Edition, *stare decisis* is: "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Shields argues that the Ethics Commission violated *stare decisis* because Advisory Opinion 93-94 stated that KRS 11A.020 (1)(c) contained no prohibition to the employment of family members and Advisory Opinion 04-34 stated that KRS 11A.020 (1)(c) prohibited such employment.

22. In the first year of its existence, the Executive Branch Ethics Commission, under the authority of KRS 11A.110(1) issued Advisory Opinion 92-10 which concluded that PVAs were covered by the Executive Branch Code of Ethics. Advisory Opinion 93-24 then followed in response to a query as to whether the Executive Branch Code of Ethics "disallowed" PVAs' employing relatives. Advisory Opinion 93-24 stated "the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices. However. . . ." [Emphasis added.] The Commission then cited KRS 11A.020(1)(a) and (c) and concluded: "The Commission envisions certain circumstances where conflicts of interest could arise under such

employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area.” In short, the Commission did not state that the Code prohibited nepotism, but it did warn that employing family members could create conflicts of interest. Advisory Opinion 93-24 seemed to issue a “word to the wise,” because the Commission knew that many PVAs traditionally had family members in their offices.

23. In its post-hearing closing the Ethics Commission agreed that Advisory Opinion 93-24 did state that family members could work in the same office—but family favoritism would not be permitted. A PVA could create a conflict of interest by hiring members of his own family. The Opinion indicated that family members already employed in an office could remain.

24. On September 30, 2004, the Commission on its own motion again took up the issue of family members being employed in the same state agency as a public servant. The occasion was recent investigations within the Department of Parks which revealed that Parks and other state agencies needed further guidance. Advisory Opinion 04-34 again recited KRS 11A.020(1) and then firmly stated that KRS 11A.020(1) prohibits a public servant “from advocating or influencing in any way the employment, appointment, promotion, transfer, advancement of a member of the public servant’s family” within an agency that the public servant “directly supervises or manages.”

25. Jill LeMaster, who was the Executive Director of the Executive Branch Ethics Commission from 1993 until May 31, 2008, testified that Advisory Opinion 04-34 was an attempt to clarify Advisory Opinion 93-24. Tr. at 154. LeMaster stated that the Commission always thought that public servants should not give an advantage to family members.

26. On July 29, 2007, the Ethics Commission issued Advisory Opinion 07-19 which reviewed nepotism under the Code of Ethics and amended Advisory Opinion 04-34. The Opinion

took up the persistent problem of how to deal fairly with family members who were already under the supervision of a family member and had been for many years. The Opinion reiterated that a public servant should not show favoritism toward family members.

27. Advisory Opinion 07-19 urged a layer of supervision between a family member and a public servant to remove as much potential for conflict as possible. Shields made no attempt to have a layer of supervision between herself and her husband. The Hearing Officer finds, anyway, that because the PVA wields all of the authority in regard to personnel decisions and because the Office in Taylor County had only four employees, there was no barrier preventing a conflict of interest.

28. Thus, the advisory opinions have consistently said that public servants' employing, promoting, and supervising their family members creates conflicts of interest. The Advisory Opinions started out gently in their warnings in 93-24; became quite firm in 04-34; and then relented a bit in 07-19 in regard to previously employed family members. LeMaster stated that the Commission's Opinions and enforcement were always reactive rather than proactive, because the Commission only had 5-6 employees.

29. Although it is useful to point out that the advisory opinions wavered a bit in the firmness with which they dealt with family members in the same office with a public servant, *stare decisis* is not relevant to this matter. Advisory opinions are just "opinions." They offer guidance; they are not judicial precedents established through litigation. And, since Shields indicated that she had not read any advisory opinions before she promoted Martin, it cannot be said that she relied upon Advisory Opinion 93-24 or any other opinion. Tr. at 106.

30. Shields also offered as an affirmative defense "Violation of the Doctrine of Contemporaneous Construction." This doctrine used in this context is quite similar to *stare*

decisis. The doctrine as defined in *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky., 1991) means that “In most cases, an agency’s interpretation of its own regulations is entitled to substantial deference. ... A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight.” In this instance, advisory opinions are used as interpretations or regulations according to Shields. Therefore, because of contemporaneous construction, as stated in *In re Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky., 2001): “An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”

31. The Hearing Officer, as previously stated, concludes that the focus of the nepotism opinions shifted slightly but there was no significant contradiction. Advisory Opinions 93-24, 04-34, and 07-19 were rational elaborations that provided a chain of coherent advice. Because Shields did not believe that the Executive Branch Code of Ethics concerned her as a PVA, she cannot effectively argue that the Code was ineffective in guiding her conduct. Tr. at 106-107. Shields testified “I would say probably—well, as far as actually—I mean, to say that it was actually a law, I don’t think that I still know that that is accurate.” Tr. at 106.

32. The final legal argument made by Shields seemed to be that the Commission had violated KRS 13A.120 by issuing unauthorized guidance concerning conflicts of interest and nepotism in the advisory opinions and by not promulgating specific anti-nepotism regulations. KRS 11A.110 (1) clearly gives the Commission the authority to “issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinions to guide their own conduct.” Shields also suggested that OAG Opinion 88-15 which found “no specific authorizing regulation for the Personnel Commissioner and the Personnel Board to promulgate regulations concerning nepotism,” somehow prohibited the Executive Branch Ethics

Commission from concerning itself with nepotism. The Hearing Officer does not find it persuasive to argue that because the Personnel Board or the Personnel Commission cannot promulgate regulations against nepotism, the Legislature could not give the statutory authority to deter conflicts of interest or favoritism in the form of nepotism in the executive branch of the state government to another administrative body.

33. The statutes that are cited by Shields as being permissible anti-nepotism statutes are concerned with members of electric and water plants of third-class municipalities (KRS 96.172), members of boards of trustees of state universities (KRS 164. 225), local school boards (KRS 160.180), school councils for school-based decision making (KRS 164.345), and school superintendents and principals (KRS 160.380). These statutes support the view that the Commonwealth has wide reaching concerns about the nefarious impact of nepotism on the local as well as the state level.

34. Further, the above-cited statutes indicate that nepotism can be dealt with through statutes and does not require regulations. *Hagan v. Farris*, 807 S.W.2d 488 (Ky., 1991), and *Department of Education v. Gobert*, 979 S.W. 2d 922, 926 (Ky., 1998), are relied upon by Shields for the proposition that regulations are essential to interpret KRS 11A.020 (1)(c). However, those cases most firmly stand for the proposition that regulations cannot contradict statutes. Regulations may be used to “flesh out” statutes but KRS 11A.020(1)(c) does not suffer from any vagueness problems.

35. Finally, Shields offered Governor Steven Beshear’s Executive Order of June 2, 2008, as a standard against which to judge the arbitrariness of the Commission’s actions in charging Shields with violating KRS 11A.020(1)(c). That Executive Order stated that it is the Commonwealth’s policy to provide equal employment opportunity to all people without

discrimination because of race, color...ancestry....” The Hearing Officer concludes that this broad affirmative policy set out in an Executive Order opens the doors of opportunity to all within the state. The practice of nepotism means that the door keeper only lets those related by birth or marriage enter the door of opportunity. The Commission’s view of KRS 11A.020(1)(c) supports public trust, impartiality, and the integrity of public servants. It compliments the Executive Order of June 2, 2008.

36. Shields’s contrast of KRS 11A (1)(c)’s ethical injunction against a public servant using his office to obtain financial gain for himself or any members of his family with KRS 132.590 (8) concerning the personnel classification system for PVA deputies and KRS 18A.110(5) concerning the Personnel Secretary’s authority to promulgate regulations is not convincing as a constitutional argument. Nor is Advisory Opinion 07-19 an *ex post facto* law.

37. It is to be stressed that this case was brought under KRS 11A.020 (1)(c)—no Advisory Opinion was cited in the Initiating Order. The Advisory Opinions are useful in providing guidance, but the foundation of the complaint against Shields is the statute. The evidence presented at the Hearing is that Shields hired her husband in the Taylor County PVA Office and then promoted him after all PVAs had been warned that such favoritism is a violation of KRS 11A.020 (1)(c). Shields, like all citizens, is presumed to be familiar with the law of the state:

It is well established that all persons are charged with knowledge of the laws pertaining to their conduct. *Flint v. Executive Branch Ethics Commission*, 981 S.W.2d 132, 134 (Ky. App., 1998).

38. In mitigation of the penalty against Shields it can be said that she was doing what a lot of PVAs were doing—showing favoritism to family members. In counter-mitigation it must pointed out that Martin was promoted after Shields knew that the Ethics Commission considered

the employing of family members to be unethical.

39. The statute states: “ No public servant, by himself or through others, shall knowingly . . . use his official position or office to obtain financial gain for himself or any member of the public servant’s family.. . .” The evidence presented at the Hearing was clear and convincing that Shields knowingly used her position as PVA to obtain financial gain for her husband, Martin Shields. She provided him with a secure, anxiety free job. Julie Shields should henceforth not hire or promote family members as employees in the Taylor County PVA Office. She should post a copy of KRS 11A.020 prominently in a public place in her office as a reminder of the law. Because Shields put her resources toward determining the full requirements of the law in *Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W. 3d 472 (Ky. App. 2011), she should pay a reduced penalty of \$4,000.

RECOMMENDED ORDER

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Julie Shields be ordered to henceforth obey KRS 11A.020(1)(c); to post a copy of KRS 11A.020 prominently in a public place in her office as a reminder of the law; and to pay a civil penalty of \$4,000 to the Executive Branch Ethics Commission.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

- (4) A copy of the hearing officer’s recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with

which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO ORDERED this 13th day of March, 2012.



SUSAN S. DURANT
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CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was mailed this 13th day of March, 2011, by messenger mail, to:

DEBBIE BRISCOE
EXECUTIVE ASSISTANT
EXECUTIVE BRANCH ETHICS COMM
#3 FOUNTAIN PLACE
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for filing; and a true copy was sent by first-class mail, postage prepaid, to:

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A handwritten signature in cursive script, appearing to read "Stephanie B.", is written over a horizontal line.

DOCKET COORDINATOR

080344fc.ssd.wpd